

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHRISTOPHER B.,

Plaintiff.

V.

ACTING COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 3:23-CV-05950-TLF

ORDER REVERSING AND REMANDING FOR AWARD OF BENEFITS

Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of defendant's denial of plaintiff's application for disability insurance benefits ("DIB").

Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 3. Plaintiff challenges the Administrative Law Judge's ("ALJ") decision finding that plaintiff was not disabled. Dkt. 1, Complaint.

On April 11, 2021, plaintiff filed their application for DIB under Title II, alleging a disability onset date of April 7, 2013, and a date last insured of December 31, 2018. AR 430-431, 445-446. After the Commissioner denied benefits initially and on reconsideration, plaintiff requested a hearing. AR 221-225, 233-239. The ALJ held three hearings. AR 95-112, 113-171, 172-194. The first hearing was conducted by ALJ Lawrence Lee. AR 97. The second (AR 115) and third (AR 174) hearings were conducted by ALJ Allen Erickson, and ALJ Erickson issued a written decision on May

1 23, 2023, finding that plaintiff was not disabled. AR 66-93. The Appeals Council denied
2 review. AR 1-7.

3 The ALJ found that plaintiff had the severe impairments of: "bilateral hip labral
4 tears status-post surgeries; cyclic vomiting syndrome with gastroesophageal reflux
5 disease (GERD); tension headaches; and posttraumatic stress disorder (PTSD)." AR
6 72. Plaintiff testified during the first two hearings. AR 98-111; 123-148, 156-161.

7 A medical expert, Dr. David B. Peterson, Ph.D., and a vocational expert, Sharon
8 Welter, testified in the second hearing. AR 69, 150-170. Dr. Peterson stated that
9 plaintiff's symptoms and limitations, in his opinion, satisfied each of the criteria for
10 Listing 12.15 regarding PTSD. AR 152. Dr. Peterson agreed with the assessments of
11 Dr. Coder and Dr. Hellings; Dr. Peterson also agreed with the alleged date of onset for
12 PTSD and stated that review every three years would be appropriate. AR 152-155.

13 A consulting medical expert, Dr. John A. Daller, testified during the third hearing.
14 AR 69, 176-192. Dr. Daller stated that due to cyclical vomiting, which he characterized
15 as eosinophilic esophagitis (AR 179), plaintiff would have a need to rest due to attacks
16 from the eosinophilic esophagitis. AR 181. Plaintiff would likely miss two to three days of
17 work per month, and that plaintiff would be off-task at least one hour per day due to
18 needing to use the restroom, taking a break from the workstation – and this would occur
19 randomly and at will when plaintiff needs it. AR 182, 189-192.

20 DISCUSSION

21 The parties agree that the ALJ committed harmful error, with respect to medical
22 evidence, and plaintiff's statements about symptoms and limitations. Dkt. 18,
23 Defendant's Brief, at 1-2, requesting remand. The issue before the Court is limited to
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1 whether the proper remedy would be a remand for award of benefits, or a remand for
 2 further proceedings. *Id.* at 2-10; Dkt. 12, Plaintiff's Opening Brief at 2, 16; Dkt. 19, Reply
 3 Brief.

4 **Whether the Court should reverse with a direction to award benefits.**

5 "The decision whether to remand a case for additional evidence, or simply to
 6 award benefits[,] is within the discretion of the court." *Trevizo v. Berryhill*, 871 F.3d 664,
 7 682 (9th Cir. 2017) (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987)). If
 8 an ALJ makes an error and the record is uncertain and ambiguous, the court should
 9 remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045
 10 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy
 11 the ALJ's errors, it should remand the case for further consideration. *Revels v. Berryhill*,
 12 874 F.3d 648, 668 (9th Cir. 2017).

13 The Ninth Circuit has developed an analysis that includes three elements all of
 14 which must be satisfied for a remand to award benefits. Such remand is generally
 15 proper only where:

16 "(1) the record has been fully developed and further administrative
 17 proceedings would serve no useful purpose; (2) the ALJ has failed
 18 to provide legally sufficient reasons for rejecting evidence, whether
 19 claimant testimony or medical opinion; and (3) if the improperly
 20 discredited evidence were credited as true, the ALJ would be
 21 required to find the claimant disabled on remand."

22 *Trevizo*, 871 F.3d at 682-83 (quoting *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th
 23 Cir. 2014)). The court is prohibited from accepting as true improperly rejected evidence
 24 and skipping to the consideration of whether there are outstanding issues that remain.
 25 *Leon*, at 1046; *Dominguez v. Colvin*, 808 F.3d 403, 409 (9th Cir. 2015). As to the third
 step, "the district court must consider the testimony or opinion that the ALJ improperly

1 rejected, in the context of the otherwise undisputed record, and determine whether the
2 ALJ would necessarily have to conclude that the claimant were disabled if that
3 testimony or opinion were deemed true." *Dominguez*, at 407.

4 "Except in rare circumstances," the district court should "remand to the agency
5 for additional investigation or explanation." *Treichler v. Comm'r of Soc., Sec. Admin.*,
6 775 F.3d 1090, 1099 (9th Cir. 2014). The Ninth Circuit emphasized in *Leon* that even
7 when each element or the review concerning the appropriate remedy on remand is
8 satisfied, the district court still has discretion to remand for further proceedings or for
9 award of benefits. *Leon*, 80 F.3d at 1045; see also *Burrell v. Colvin*, 775 F.3d 1133,
10 1141-1142 (9th Cir. 2014) (even assuming all three elements of the criteria for deciding
11 the remedy were satisfied, the Ninth Circuit Court of Appeals found the record as a
12 whole created serious doubt about whether the plaintiff was disabled; remand for award
13 of benefits was therefore unwarranted).

14 Here, the parties agree that part two of the remedy analysis is satisfied, but the
15 first element – whether the record needs further development, and whether outstanding
16 issues and ambiguity exists that could be addressed on remand – is at issue. *Trevizo*,
17 871 F.3d at 682-83. Regarding element two, plaintiff asks that the Court remand for an
18 award of benefits based on the ALJ's errors in evaluating the medical opinion evidence
19 and plaintiff's subjective testimony.

20 Regarding element one, plaintiff asserts that a remand for further proceedings in
21 this case would be of limited utility, as no new testimony or medical evaluations
22 regarding plaintiff's condition during the period at issue would be forthcoming, and
23 providing another opportunity to assess improperly evaluated evidence does not qualify

1 as a remand for a “useful purpose” under the first part of the credit as true analysis.
2 *Garrison*, 759 F.3d at 1021-22, (citing *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir.
3 2004) (“Allowing the Commissioner to decide the issue again would create an unfair
4 ‘heads we win; tails, let’s play again’ system of disability benefits adjudication.”)).

5 The defendant contends there is a useful purpose to be served by remanding for
6 additional proceedings. According to the defendant, even though there is a fixed period
7 at issue for a decision whether plaintiff qualifies to receive SSDI benefits – April 7, 2013,
8 through December 31, 2018 – the medical record does not fully support the limitations
9 described in plaintiff’s statements, or limitations that have been found in the reports of
10 Dr. Daller and Dr. Peterson. Dkt. 18 at 5. Defendant also asserts that the findings of Dr.
11 Hale and Dr. Staley are at odds with Dr. Daller’s opinion. *Id.*

12 Regarding plaintiff’s testimony and statements about symptoms and limitations,
13 the ALJ determined that plaintiff’s vomiting had started before the alleged onset date
14 and the cyclical vomiting persisted during the relevant period. AR 82. There was no
15 finding of malingering.

16 The medical evidence considered by the ALJ includes assessments by medical
17 professionals before, during, and after the relevant period. With respect to plaintiff’s
18 diagnosis of cyclical vomiting syndrome, the record shows ongoing and persistent
19 symptoms and limitations. Plaintiff was discharged from the United States Army in 2012
20 because he was vomiting so often he could not perform any work assigned to him. AR
21 2498-2509.

22 The longitudinal record shows that during the period between April 7, 2013,
23 through December 31, 2018, plaintiff repeatedly went to the emergency room, urgent
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1 care, and appointments with general practitioners and specialists to obtain treatment for
2 vomiting. AR 1014-1-17 (Dr. Alvarez notes, March 2014); AR 1170 (Dr. Christensen
3 notes, May 2014); AR 1178-1181 (Dr. McPeak, Dr. Noonan, notes, June 2013); AR
4 1286, AR 1657-1668 (emergency department notes, March 2018); AR 1673-1682
5 (emergency department notes, December 2017); AR 1716-1717 (notes from PA-C
6 Weissinger, November 2015, plaintiff vomiting for 2 days); AR 1719-1726 (Dr. MacLeod
7 notes, May 2015, plaintiff vomits on a daily basis); AR 1738-1783 (multiple notes during
8 March and April 2014 from various medical providers regarding plaintiff's headaches
9 and vomiting). The record also shows in 2019-2023 that plaintiff continued to have
10 extreme problems with vomiting. AR 2798-2855, 1379-1380, 1139-1144. On one
11 occasion during examination, plaintiff denied vomiting. AR 1711 (reported no vomiting,
12 during examination for hearing loss, 11-22-2016).

13 Defendant argues that Dr. Hale and Dr. Staley gave assessments in 2021 stating
14 that plaintiff would be able to sufficiently control vomiting and headaches by not
15 engaging in strenuous activity; therefore, a limitation to "light work" was recommended
16 as being consistent with the medical evidence. AR 209-210, 218-220.

17 Even if the Court assumes (without deciding), for purposes of this analysis, the
18 accuracy of defendant's contention that a remand for additional proceedings would be
19 required to clarify the conflict between medical evidence from Dr. Hale and Dr. Staley,
20 compared with the opinions expressed by Dr. Daller and plaintiff's statements
21 concerning symptoms and limitations pertaining to cyclical vomiting and headaches, the
22 same cannot be said for the evidence concerning plaintiff's mental health conditions.

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1 Regarding mental health and plaintiff's PTSD symptoms and limitations, the
2 medical record has clarity. Plaintiff consistently sought treatment, and the notes of
3 psychiatrists, psychologists, and therapists, document that plaintiff's occupational
4 impairments included at least two marked symptoms and limitations, consistent with Dr.
5 Peterson's assessment. *E.g.*, AR 1075, 1147 (Bradford Smith, MSW, notes dated 7-26-
6 2017, "Veteran continues to maintain all symptoms at least at baseline. However, this
7 should not be interpreted as improvement. Veteran's condition remains a significant
8 impairment. . . ."), 1160, -1167, 1173-1176, 1183-1197 (May and June 2013, initial
9 PTSD assessment by Dr. Hyatt and Dr. Christensen); 2304-2377 (ongoing outpatient
10 therapy for many years). Dr. Richard Coder diagnosed PTSD on June 7, 2012, noting
11 that plaintiff was 23-years-old and already had served five years in the Army. AR 1028-
12 1033. Dr. Hellings made clinical findings on March 18, 2014, showing that plaintiff
13 exhibited severe symptoms that were consistent, continuous, and caused
14 "[o]ccupational and social impairment with reduced reliability and productivity." AR
15 1021-1024.

16 Plaintiff testified during the hearings on April 21, and on October 13, 2022, that
17 his only socializing was once per week when he and his spouse attended an American
18 Legion war veteran PTSD group. AR 101. He stated that it was intensely traumatic
19 when he was in the military and in the war areas of Iraq and Afghanistan; for example,
20 on the day he was being transferred out of the Afghanistan war zone due to vomiting, it
21 weighed on plaintiff psychologically, including the fact the "[s]quad leader medic got
22 shot and bled out the day I was leaving." AR 105. Plaintiff stated in the adult function
23 report (8-17-2021) that he goes to coffee shops, and church, but "PTSD makes me get
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1 angry easy and no one understands." AR 536-540. Plaintiff said he only keeps in touch
2 with a few individuals that he served with in the military operations of Iraq or
3 Afghanistan; they check in on each other because their unit had three suicides within a
4 two-year time span. AR 107.

5 Plaintiff described how there were many times he was awake at night because
6 "shooting into houses with women and children that keep me awake; it was either them
7 or us." AR 110. Plaintiff was in his late teens and early 20's during his time serving in
8 the military and he led troops who were very young people at that time; he had done
9 one tour of duty in Iraq, and one in Afghanistan. AR 128, 137. Between the first tour in
10 Iraq, and the second tour, "I was already seeing psych because Iraq was . . . There's a
11 bomb everywhere." AR 137. Plaintiff stated that by the time he arrived in his new unit,
12 he "went through hell for 15 months. . ." AR 140. Plaintiff testified he had been
13 attending PTSD meetings and going to therapy for PTSD since 2010. AR 140, 144-145.
14 He had taken medications but, according to his testimony, plaintiff "didn't like how they
15 made me feel to be honest. They were – I was up and I was down, and I was up and I
16 was down, sir. And so I deal with it by basically staying home and meeting other combat
17 vets, talking to my friends who I served with personally." AR 143. Plaintiff stated that he
18 did try medications after his first deployment and a little bit after the second deployment.
19 AR 159.

20 Plaintiff stated he was "scared to death" to ever again ride in an airplane. AR
21 146. He continues to have nightmares and flashbacks that are so realistic he loses
22 bladder control. AR 160.

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1 Dr. Gilbert stated (9-14-2021) that plaintiff's medical records contain insufficient
2 information for rating functional impairments with respect to plaintiff's mental health
3 conditions. AR 207, 217. Dr. Gilbert did not review Dr. Peterson's assessment, because
4 she issued her opinion about one year later. Dr. Peterson (10-13-2022) testified that
5 plaintiff experienced "fatigue, irritability, aggression, anxiety, depression, and changes
6 to personality." AR 153. Dr. Peterson opined that plaintiff met the criteria for Listing
7 12.15; Dr. Peterson found plaintiff had a marked inability to interact with others and
8 marked inability to adapt. AR 152-153. These marked limitations were rejected by the
9 ALJ; the ALJ did not include them in either the hypothetical to the VE or the ALJ's
10 assessment of plaintiff's residual functional capacity. AR 75-76, 163.

11 The defendant argues that Dr. Staley and Dr. Hale have opinions that create
12 ambiguity. Yet they provided opinions based on plaintiff's longitudinal medical records,
13 and those records would not change on remand. The purpose of remand for additional
14 proceedings is to provide more clarity in the record, but because this is a closed period
15 at issue, no additional medical information is available.

16 The court is prohibited from accepting as true improperly rejected evidence and
17 skipping to the consideration of whether there are outstanding issues that remain. *Leon*
18 *v. Berryhill*, 880 F.3d 1041, 1046 (9th Cir. 2017); *Dominguez v. Colvin*, 808 F.3d 403,
19 409 (9th Cir. 2015). The Court disagrees with defendant that remand for additional
20 proceedings is required, to allow the Commissioner an opportunity to resolve ambiguity
21 concerning the opinions of Dr. Staley and Dr. Hale when compared with opinion of Dr.
22 Haller. The points of contention between these experts are related to plaintiff's
23 headaches and vomiting.

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1 There is no arguable conflict in the evidence relating to plaintiff's mental health
2 symptoms and limitations connected to plaintiff's condition of PTSD. Dr. Gilbert merely
3 stated an opinion that evidence was insufficient to make any finding. But Dr. Gilbert's
4 opinion did not directly refute any of the evidence provided by the opinions of Dr.
5 Peterson. The ALJ's decision agreeing with Dr. Gilbert's finding of insufficient evidence
6 and rejecting Dr. Peterson's opinion as well as plaintiff's statements about PTSD-related
7 symptoms and limitations, is not supported by substantial evidence in the record.

8 *Biestek v. Berryhill*, 587 U.S. 97 (2019); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-
9 1041 (9th Cir. 2007). As to the plaintiff's PTSD symptoms and limitations, there is no
10 ambiguity or conflict that would be resolved through a new hearing on remand. See,
11 *Ferguson v. O'Malley*, 95 F.4th 1194, 1200 (9th Cir. 2024) (the ALJ cannot render the
12 claimant's testimony superfluous by demanding that positive objective evidence in the
13 medical record fully corroborates each allegation plaintiff makes in their subjective
14 testimony.)

15 Therefore, the Court will remand for award of benefits on the basis that there is
16 no ambiguity to be resolved; the record supports Dr. Peterson's assessment and
17 plaintiff's statements that mental health conditions experienced by plaintiff show
18 consistent and persistent symptoms of PTSD and result in marked limitations in
19 plaintiff's ability to interact with others in the workplace and marked limitations in
20 plaintiff's ability to adapt in the workplace. If plaintiff's statements, and Dr. Peterson's
21 opinions are credited as true, plaintiff would necessarily be found disabled under the
22 relevant criteria of Listing 12.15. *Disability Evaluation Under Social Security*, 12.00
23 *Mental Disorders - Adult*, <https://www.ssa.gov/disability/professionals/bluebook/12.00->

1 [Mental Disorders-Adult](#) (accessed on 10-24-2024). Under *Garrison v. Colvin*, 759 F.3d
2 995, 1020-1023 (9th Cir. 2014) and other Ninth Circuit precedent, this case fits the
3 unusual, rare, category of situations where remand for award of benefits is appropriate.

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5 CONCLUSION
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7 Based on the foregoing discussion, the Court concludes the ALJ improperly
8 determined plaintiff to be not disabled. Therefore, the ALJ's decision is reversed and
9 remanded for award of benefits.

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11 Dated this 29th day of October, 2024.
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14 Theresa L. Fricke
15 United States Magistrate Judge
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